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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BNSF RAILWAY COMPANY,

12 Plaintiff,

13 v.

14 CLARK COUNTY, WASHINGTON; MITCH
15 NICKOLDS, in his official capacity as Director
16 of Community Development of Clark County;
17 KEVIN PRIDEMORE, in his official capacity
18 as Code Enforcement Coordinator of Clark
County; RICHARD DAVIAU, in his official
capacity as County Planner of Clark County ,

19 Defendants.
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No. 3:18-cv-5926

CLARK COUNTY DEFENDANTS'
RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION

NOTING DATE: December 19, 2018

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>3570 E. Foothill Blvd., Inc., v. City of Pasadena</i> , 912 F. Supp. 1257 (C.D. Cal. 1995)	8
<i>American Passage Media Corp. v. Cass Communications, Inc.</i> , 750 F.2d 1470, (9 th Cir. 1985).....	11
<i>Amer. Trucking Ass'n v. City of Los Angeles</i> , 559 F.3d 1046 (9 th Cir. 2009)	12
<i>Ass'n of Am. RRs v. S. Coast Air Quality Mgmt. Dist.</i> , 622 F.3d 1094, 1098 (9 th Cir. 2010)	1, 9
<i>Boston and Maine Corp. and Town of Ayer, MA</i> , STB No. FD 339710 (2001).....	1-2, 9-10, 13
<i>Broughton Lumber Co. v. Columbia River Gorge Comm'n</i> , 975 F.2d 616 (9 th Cir. 1992)	18
<i>Columbia River Gorge United v. Yeutter</i> , 960 F.2d 110 (9 th Cir. 1992).....	5
<i>Cornish v. Dudas</i> , 540 F. Supp. 2d 61 (D.D.C. 2008), <i>aff'd sub nom., Cornish v.</i> <i>Doll</i> , 330 F. App'x 919 (Fed. Cir. 2009)	15
<i>Flexible Lifeline Sys. v. Precision Lift, Inc.</i> , 654 F.3d 989 (9 th Cir. Mont. 2011)	15
<i>GoTo.com, Inc., v. Walt Disney Co.</i> , 202 F.3d 1199 (9 th Cir. 2000)	14
<i>Hodgers-Durgin v. de la Vina</i> , 199 F.3d 1037 (9 th Cir. 1999)	11
<i>Munaf v. Geren</i> , 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008).....	8
<i>New Motor Vehicle Bd. of California v. Orrin W. Fox Co.</i> , 434 U.S. 1345, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977).....	16
<i>Oakland Trib. Inc., v. Chron. Pub. Co.</i> , 762 F.2d 1374 (9 th Cir. 1985).....	14
<i>Sammartano v. First Judicial District Court</i> , 303 F.3d 959 (9 th Cir. 2002).....	15
<i>Seaside Civic League, Inc., v. United States HUD</i> , 2014 U.S. Dist. LEXIS 147733, *1 (N.D. Cal. Oct. 15, 2014).....	15
<i>Sierra On-Line, Inc., v. Phoenix Software, Inc.</i> , 739 F.2d 1415 (9 th Cir. 1984).....	8, 14
<i>Stormans, Inc., v. Selecky</i> , 586 F.3d 1109 (9 th Cir. 2009)	14

<i>Syntek Semiconductor Co., Ltd., v. Microchip Technology, Inc.</i> , 307 F.3d 775, (9 th Cir. 2002)	18
<i>Tanner Motor Livery, Ltd., v. Avis, Inc.</i> , 316 F.2d 804 (9 th Cir. 1963).....	14
<i>Union Pacific Railroad Company v. Runyon</i> , U.S. Dist. Ct., Oregon, 320 F.R.D. 245 (2017)....	3
<i>United States v. General Dynamics Corp.</i> , 828 F.2d 1356 (9 th Cir. 1987).....	17-18
<i>Winter v. NRDC</i> , 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)	8, 11

Federal Constitution and Statutes:

Columbia River Gorge National Scenic Area Act, Pub L. No. 99-663, 100 Stat. 4274 (1986), 16 U.S.C. §§ 544-544p.....	<i>passim</i>
16 U.S.C. § 544a.....	4
16 U.S.C. § 544c.....	4
16 U.S.C. § 544d.....	17
16 U.S.C. § 544d – 544f	5, 17
16 U.S.C. § 544e.....	10
16 U.S.C. § 544e(b)	6
16 U.S.C. § 544f(h).....	10
16 U.S.C. §§ 544f(h) – (j).....	6
16 U.S.C. § 544i.....	5
16 U.S.C. § 544l.....	5
16 U.S.C. § 544m(a)(2).....	3, 17
16 U.S.C. § 544m(a)(3).....	17
16 U.S.C. § 544m(b)(4)	3
16 U.S.C. § 544m(b)(6)	3
16 U.S.C. §§ 544m(b)(4)-(6)	18
16 U.S.C. § 544n(c)	5
Interstate Commerce Commission Termination Act of 1995, Pub. L. No 104-88, 109 Stat. 803.	1
49 U.S.C. § 10501(b).....	10

State and Local Statutes:

ORS 196.150.....	5
RCW 43.97.015	5

INTRODUCTION

In attempting to meet the high burden for injunctive relief, BNSF Railway Company (“BNSF”) incorrectly argues that the Interstate Commerce Commission Termination Act (“ICCTA”) preempts the federal environmental regulatory scheme established by the Columbia River Gorge National Scenic Area Act (“National Scenic Area Act”), which was enacted by Congress and signed into law in 1986. 16 U.S.C §§ 544-544p. Fundamentally, BNSF’s preemption argument fails because the National Scenic Area Act, a federal environmental statute, authorizes and depends upon Clark County and the Columbia River Gorge Commission (“Gorge Commission”) to implement federal environmental law within the Columbia River Gorge.

In advancing its preemption argument, BNSF ignores relevant legal authority that is directly contrary to its position from the Ninth Circuit and the Surface Transportation Board (“STB”), each of which have held that preemption is not applicable when ICCTA may conflict with federal environmental law. *Joint Petition for Declaratory Judgment Order - Boston and Maine Corp. and Town of Ayer, MA, STB No. FD 339710, 2001, cited with approval by Ass’n of Am. RRs v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1098 (9th Cir. 2010)*. Rather, as the STB’s *Town of Ayer* decision explains, the appropriate analytical framework for evaluating how ICCTA interacts with another federal regulatory scheme is to review each individual action for impact on interstate commerce and whether a competing statute or regulation is applied in a discriminatory manner or used as a pretext for frustrating or preventing a particular activity. The Ninth Circuit has adopted this analysis in *Ass’n of Am. RRs*, holding that “if an apparent conflict exists between ICCTA and a federal law, courts must strive to harmonize the two laws, giving effect to both laws if possible.” *Id.* at 1098 (*emphasis*

1 *in original*). BNSF's failure to even cite *Town of Ayer* is especially puzzling because it cited
2 the case in a letter to Clark County just prior to initiating this declaratory judgment action.
3 (Dkt. 9, pp. 25-26.)

4 BNSF has also omitted the fact that it has already obtained other approvals relating to
5 this project from governmental agencies based upon its express representation that it would be
6 seeking and obtaining a Columbia River Gorge National Scenic Area Permit ("National Scenic
7 Area Permit") from Clark County. (Declaration of Vincent McGowen, "Decl. of McGowen,"
8 ¶¶ 4-5, Exs. A-B.) Specifically, on or about January 14, 2016, BNSF submitted a State
9 Environmental Policy Act ("SEPA") checklist to the Washington Department of Ecology
10 which conceded that a National Scenic Area Permit "administered by Clark County" was
11 "needed" and that "BNSF is submitting a Land Use Application to Clark County to comply
12 with the Columbia River Gorge National Scenic Area." (Decl. of McGowen, ¶¶ 4-5, Ex. A,
13 BNSF SEPA Checklist, pp. 2, 10.) In seeking approval from the Department of Ecology,
14 BNSF also identified five archeological sites near the project site that are "within the Columbia
15 River Gorge Scenic Area in Clark County" that would be subject to review under the National
16 Scenic Area Act permitting process. (Decl. of McGowen, ¶ 4, Ex. A., BNSF SEPA Checklist,
17 p. 12.) According to BNSF, one of these known archeological sites is located just 124 feet
18 north of the project area. *Id.* Finally, In signing the SEPA checklist, BNSF's representative
19 certified that "*The above answers are true and complete to the best of my knowledge. I*
20 *understand that the lead agency is relying upon them to make its decision.*" (Decl. of
21 McGowen, ¶ 4, Ex. A, BNSF SEPA Checklist, p. 13) (*emphasis added*). On or about March
22 24, 2016, the Washington Department of Ecology issued a Determination of Non-Significance
23 in reliance upon BNSF's repeated representations that it would be seeking a National Scenic
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1 Area Permit. Consistent with BNSF's representations, the Department of Ecology's
2 Determination of Non-Significance lists "Land Use Approval – Columbia River Gorge
3 National Scenic Area (administered by Clark County)" as a "needed" permit. (Decl. of
4 McGowen, ¶ 6, Ex. A., Dept. of Ecology Determination of Non-Significance, p. 3.)

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6 Having obtained an approval from the Department of Ecology based upon the
7 representation that it would be obtaining a National Scenic Area Permit from Clark County,
8 BNSF cannot now claim that it does not need a permit because ICCTA preempts the federal
9 regulatory scheme established by the Columbia River Gorge National Scenic Area Act. Even
10 if BNSF's past representations did not defeat its current position, ICCTA authorities, including
11 the STB and the Ninth Circuit, make clear that preemption does not apply and that the
12 application of the National Scenic Area authorities to BNSF's permit application must be
13 harmonized with ICCTA. While ICCTA does not specify who must harmonize the law, the
14 National Scenic Area Act expressly requires disputes involving a county's National Scenic
15 Area permitting decision to be appealed to the Gorge Commission with further appeal to state
16 court. 16 U.S.C. §§ 544m(a)(2), 544m(b)(4), 544m(b)(6). Moreover, the Oregon U.S. District
17 Court has recently observed that the Gorge Commission is an adequate forum to balance
18 competing requirements of the National Scenic Area Act and ICCTA. *Union Pacific Railroad*
19 *Company v. Runyon*, U.S. Dist. Ct., Oregon, 320 F.R.D. 245, 255 (2017). Clark County and
20 the Gorge Commission's appeal process is akin to formal adjudication under the federal
21 Administrative Procedures Act and is appealable to state trial and appellate courts, a process
22 that works well for complex legal issues. BNSF has applied for twelve National Scenic Area
23 Permits pursuant to this process since ICCTA was enacted in 1995 and has never been denied a
24 permit. (Dkt. 38, Declaration of Nancy Andring, ¶¶ 2-3.)
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1 Because BNSF has previously committed to obtaining a National Scenic Area Permit
2 for this project and because, as a matter of law, ICCTA preemption does not extend to federal
3 environmental laws, BNSF cannot succeed on the merits of its primary legal theory in this case
4 and, thus, cannot meet the high standard necessary to obtain a preliminary injunction.
5 Moreover, BNSF has not demonstrated that it will suffer irreparable harm as a result of being
6 exposed to the due process and appellate review authorized by the National Scenic Area Act, a
7 federal environmental law. For these reasons, and because the equities and public interest
8 weigh *against* the requested preliminary injunction, BNSF's motion should be denied.
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10 STATEMENT OF FACTS

11 A. The Columbia River Gorge National Scenic Area.

12 The Columbia River Gorge is located just east of Vancouver, Washington, and Portland,
13 Oregon. In 1986, Congress enacted the Columbia River Gorge National Scenic Area Act, Pub.
14 L. No. 99-663, 100 Stat. 4274 (1986), codified, as amended, at 16 U.S.C. §§ 544 to 544p (2012).
15 The National Scenic Area Act created the Columbia River Gorge National Scenic Area with land
16 area in portions of three counties in Oregon and three counties in Washington, including Clark
17 County, Washington. The primary purpose of the Act is to protect and provide for the
18 enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River
19 Gorge. 16 U.S.C. § 544a. The second purpose of the Act is to provide for economic
20 development consistent with the first purpose. *Id.*
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24 The National Scenic Area Act authorized Oregon and Washington to enter into an
25 interstate compact to manage development within the National Scenic Area consistent with the
26 standards in the National Scenic Area Act. 16 U.S.C. § 544c. However, as a condition of this
27 consent, Congress specifically required that counties located within the National Scenic Area and
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1 the Gorge Commission possess the permitting and enforcement powers necessary to implement
2 the National Scenic Area Act. Oregon and Washington subsequently entered into and codified
3 such an interstate compact to implement the regional regulatory scheme established by the
4 National Scenic Area Act. *See* ORS 196.150; RCW 43.97.015. The Ninth Circuit Court of
5 Appeals has upheld the constitutionality of the National Scenic Area Act and has characterized
6 the Columbia River Gorge Compact as “an innovative solution to a difficult interstate land
7 management problem.” *Columbia River Gorge United v. Yeutter*, 960 F.2d 110, 114–15 (9th
8 Cir. 1992).

10 The National Scenic Area Act requires that the Gorge Commission and the U.S.
11 Secretary of Agriculture jointly develop a management plan for the Scenic Area and specifies
12 minimum land management standards for the Management Plan. 16 U.S.C. § 544d – 544f. The
13 Gorge Commission adopted the Management Plan in 1991 and the U.S. Secretary of Agriculture
14 concurred in early 1992.

16 The Gorge Commission has filed a brief in this action which more fully discusses the
17 history of the Gorge and the regulatory scheme and management plan established by the National
18 Scenic Area Act. *See* Section II (A-B) of Columbia River Gorge Commission’s Response. Clark
19 County adopts and incorporates this discussion by reference.

21 **B. Clark County’s Role in Implementing the Columbia River Gorge National Scenic**
22 **Area Act and Gorge Management Plan.**

23 The National Scenic Area Act requires Clark County to adopt and implement land use
24 ordinances consistent with the Management Plan. 16 U.S.C. §§ 544i, 544l & 544n(c). The
25 National Scenic Area Act further requires that the Gorge Commission find Clark County’s
26 ordinance consistent with the Management Plan for the non-special management areas and make
27 a tentative finding of consistency for the ordinance, as applied to special management areas. 16
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U.S.C. § 544e(b). Finally, the Secretary of Agriculture must review and concur with the Commission's tentative determination of consistency, unless the Secretary determines the ordinance is not consistent with the Management Plan. 16 U.S.C. §§ 544f(h)–(j). Clark County first adopted its National Scenic Area Unified Development Code in 1996. (Dkt. 37, Declaration of Robin Shoal, "Decl. of Shoal," ¶ 10.) The Gorge Commission approved it as consistent with the Management Plan, and the U.S. Secretary of Agriculture granted concurrence. (Dkt. 37, Decl. of Shoal, ¶ 11.)

C. BNSF's History of Applying for Permits and Commitment to Apply for a Permit for this Project.

BNSF has applied for twelve National Scenic Area Permits since ICCTA was enacted in 1995, none of which were denied. (Dkt. 38, Declaration of Nancy Andring, ¶ 2-3.) Through this permitting process, Gorge counties and the Gorge Commission have provided a forum to harmonize the requirements of the National Scenic Area Act and ICCTA. In this case, consistent with this longstanding practice, BNSF has already obtained approvals from the Washington Department of Ecology based upon its express representation that it would be seeking a National Scenic Area Permit from Clark County. (Decl. of McGowen, ¶ 4, Ex. A., Dept. of Ecology Determination of Non-Significance, p. 3.) Specifically, BNSF made the following representations to the Department of Ecology in order to obtain its approval:

10. List any government approvals or permits that will be needed for your proposal, if known.

- NPDES Construction Storm Water General Permit Authorization
- Land Use Approval - Columbia River Gorge National Scenic Area (administered by Clark County)

[...]

L. Proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, if any:

1 This project is specifically related to the existing and continued use of the
2 property as an interstate, mainline railroad. However, BNSF is submitting a
3 Land Use Application to Clark County to comply with the Columbia River
4 Gorge National Scenic Area.

5 Decl. of McGowen, ¶ 4, Ex. A, BNSF SEPA Checklist, pp. 2, 10 (*emphasis added*).

6 BNSF made each of these representations to the Department of Ecology *knowing* that they
7 would be relied upon during the agency's review of the project. In particular, BNSF's agent
8 attested to the accuracy of the representations in the SEPA checklist and confirmed that "I
9 understand that the lead agency is relying upon them to make its decision." (Decl. of McGowen,
10 ¶ 4, Ex. A, BNSF SEPA Checklist, p. 13) (*emphasis added*). And, in fact, the Department of
11 Ecology did rely upon BNSF's representations as it reviewed the project and granted approval.
12 (Decl. of McGowen, ¶ 5-6). In granting BNSF a Determination of Non-Significance, the
13 Department of Ecology specifically noted that a National Scenic Area Permit (administered by
14 Clark County) was indeed required. (Decl. of McGowen, ¶ 6, Ex. B., Dept. of Ecology
15 Determination of Non-Significance, p. 3.) Specifically, BNSF's approval from the Department of
16 Ecology states:
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19 **Permits needed:**

- 20 • NPDES Construction Storm Water General Permit Authorization
- 21 • **Land Use Approval- Columbia River Gorge National Scenic Area**
22 **(administered by Clark County)**

23 *Id.* (*emphasis added*).

24 Despite its commitments to the Department of Ecology and the requirements of the
25 National Scenic Area Act, BNSF has commenced construction without applying for a National
26 Scenic Area Permit and is presently altering the landscape in the Columbia River Gorge.
27 (Declaration of Alicia Lewis, "Decl. of Lewis," ¶ 2, Ex. A, Photographs of BNSF Construction.)
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ARGUMENT

A. BNSF Does Not Meet the Heavy Burden for a Preliminary Injunction

1. Standard for Preliminary Injunction.

The United States Supreme Court and the Ninth Circuit have consistently held that a preliminary injunction is an extraordinary and drastic remedy. *See, e.g., Munaf v. Geren*, 553 U.S. 674, 689, 128 S. Ct. 2207, 171 L. Ed.2d 1 (2008) (*citation and internal quotation marks omitted*). "A preliminary injunction [...] is not a preliminary adjudication on the merits but rather a device for preserving the status quo." *Sierra On-Line, Inc., v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Because the primary purpose of a preliminary injunction is to preserve the status quo, when a preliminary injunction would instead greatly alter the status quo, such relief must be "viewed with hesitancy and carry a heavy burden of persuasion." *3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1260 (C.D. Cal. 1995).

In this case, despite its representations to the Department of Ecology, BNSF began construction in the National Scenic Area before obtaining a required permit (or seeking relief from this or any other Court) and is currently irreversibly altering the landscape and the status quo. (Decl. of Lewis, ¶ 2, Ex. A, Photographs of BNSF Construction.) The preliminary injunction sought by BNSF would permit it to continue to alter the status quo, in direct contravention of the National Scenic Area Act and its own prior commitments.

To obtain a preliminary injunction, the moving party must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20; 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). For the reasons set

1 forth herein and in the briefs of the Gorge Commission, which is incorporated herein by
2 reference, BNSF cannot meet its heavy burden of persuasion.

3 **2. BNSF Has Not Shown it is Likely to Succeed on the Merits.**

4 BNSF cannot succeed on the merits in this case because preemption, its sole legal theory,
5 is not the correct standard for evaluating the competing requirements of two federal laws,
6 ICCTA and the National Scenic Area Act. Rather, as the Surface Transportation Board (“STB”)
7 and the Ninth Circuit have held, courts must seek to harmonize ICCTA and the competing
8 federal law, giving effect to both laws if possible. *Town of Ayer*, 5 S.T.B. 500, 2001 WL 458685,
9 at 6, fn. 28, (May 1, 2001); *Ass’n of Am. R.R.s*, 622 F.3d at 1098. Specifically, the STB has held
10 that:
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13 Of course, whether a particular Federal environmental statute, local land use
14 restriction, or other local regulation is being applied so as to not unduly restrict
15 the railroad from conducting its operations, or unreasonably burden interstate
16 commerce, is a fact-bound question. Accordingly, individual situations need to be
17 reviewed individually to determine the impact of the contemplated action on
18 interstate commerce and whether the statute or regulation is being applied in a
discriminatory manner, or being used as a pretext for frustrating or preventing a
particular activity, in which case the application of the statute or regulation would
be preempted.

19 *Town of Ayer*, 5 S.T.B. 500, 2001 WL 458685 at 6.

20 The Ninth Circuit has adopted this harmonization standard, citing, *Town of Ayer* with
21 approval, and holding that “[i]f an apparent conflict exists between ICCTA and *federal law*,
22 courts must strive to harmonize the two laws, giving effect to both laws if possible.” *Ass’n of*
23 *Am. R.R.s*, 622 F.3d at 1098 (*emphasis in original*).

24 Remarkably, BNSF does not even cite STB’s holding in *Town of Ayer* as it seeks the
25 drastic remedy of a status quo altering preliminary injunction. *Supra* at 7. BNSF’s failure to cite
26 *Town of Ayer* is perplexing given that BNSF cited the case, albeit for the wrong proposition, in a
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1 position letter to Clark County just prior to the commencement of this action. (Dkt. 9 at 25-26.)

2 In this letter, as in the present case, BNSF mistakenly characterizes Clark County's
3 implementation of the requirements of the National Scenic Area Act as mere local law and, thus,
4 cites *Town of Ayer* for the wrong proposition. *Id.* In fact, Clark County and the Gorge
5 Commission have been expressly charged with implementing the National Scenic Area Act, a
6 federal environmental law, and *Town of Ayer* stands for the proposition that federal
7 environmental laws are not preempted.
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9 Because the STB and the Ninth Circuit have concluded that ICCTA and 49 U.S.C. §
10 10501(b), in particular, *does not* preempt federal environmental laws like the National Scenic
11 Area Act, BNSF has chosen to characterize Clark County and the Gorge Commission's
12 implementation of the National Scenic Area Act as mere local law that addresses purely local
13 interests. In so doing, BNSF seeks to undermine the intricate federal regulatory scheme that
14 Congress established when it enacted the Columbia River Gorge National Scenic Area. As
15 discussed herein and in the brief of the Columbia River Gorge Commission, BNSF's position is a
16 dramatic and inaccurate oversimplification that is contrary to the law and belied by its own past
17 practice and recent representations. Moreover, there is no distinction between the National
18 Scenic Area Management Plan and Clark County's National Scenic Area Unified Development
19 Code for the purpose of characterizing Clark County's Code as federal, state or local. Both are
20 required by the National Scenic Area Act. 16 U.S.C. §§ 544e and 544f(h). Clark County's
21 National Scenic Area Unified Development Code is no less a part of the federal program simply
22 because local officials implement it.
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26 BNSF is unlikely to succeed on the merits because, as a matter of law, ICCTA
27 preemption does not extend to federal environmental laws like the Columbia River Gorge
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1 National Scenic Area Act. Accordingly, the Court must deny BNSF the drastic and status quo
2 altering relief of a preliminary injunction.

3 **3. BNSF Has Not Shown Requisite Irreparable Harm.**

4 A preliminary injunction is an extraordinary remedy and to obtain such relief,
5 Plaintiffs must demonstrate more than a mere "possibility" of harm, they need to show
6 "substantial and immediate" injury. *Winter*, 555 U.S. at 22. The need to show
7 "substantial and immediate irreparable injury" is especially strong when plaintiffs seek
8 to enjoin the activity of a state or local government. *Hodgers-Durbin v. de la Vina*, 199
9 F.3d 1037, 1042 (9th Cir. 1999) (citing what the court characterized as "the well-
10 established rule that the Government has traditionally been granted the widest latitude in
11 the dispatch of its own internal affairs.").

12 BNSF asserts that without an injunction it will suffer irreparable harm due to: (1) the
13 possibility of losing customers if they are unable to expand their rail lines to accommodate
14 increased demand; and (2) the expenditure of costs associated with complying with the
15 permitting process. (Dkt. 8 at 29-31.) As this Court correctly noted when denying BNSF's
16 motion for temporary restraining order and preliminary injunction, these allegations are
17 conclusory and unsupported by actual facts.

18 First, a showing of irreparable harm to competition requires the production of
19 probative evidence. *American Passage Media Corp. v. Cass Communications, Inc.*, 750
20 F.2d 1470, 1985 (9th Cir. 1985). Yet, BNSF fails to supply requisite evidence of
21 immediate and substantial harm, aside from a conclusory declaration from its Senior
22 General Attorney in support of its litigating position. While BNSF asserts the project in
23 question "will allow smoother, continuous movement of trains and reduce wait times . . .
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1 throughout the region” (Dkt. 10. at 3), it has offered the Court no substantiating evidence,
2 aside from a single conclusory sentence stating that it “has experienced capacity
3 constraints,” to support their assertion that the existing configuration fails to meet current
4 needs. BNSF has provided the Court with no evidence to clarify or quantify the assertion
5 that it has failed to meet past demand or that it will fail to meet near-term future demand,
6 such that the federally-mandated National Scenic Area permit process should be enjoined.
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8 The inadequacy of BNSF’s supporting evidence is illustrated by a review of *Amer.*
9 *Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009), which BNSF relies
10 upon for support that it is entitled to a preliminary injunction. In *Amer. Trucking Ass’n*, a
11 trucking industry trade association sought to enjoin the implementation of mandatory
12 concession agreement programs for certain trucking services and provided actual
13 evidence of a backlog of freight or that “all parts of [Plaintiff’s] business will
14 evaporate.” *Id.* at 1058. Here again, there is no similar evidence. BNSF has provided the
15 Court with only a conclusory statement from its Senior Attorney, but nothing else
16 demonstrating the veracity of the claims in that statement.
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18 Likewise, BNSF’s assertion that it will suffer irreparable harm by incurring costs
19 associated with submitting a permit is as curious as it is unfounded. Indeed, as BNSF explained
20 in its own position letter to the County, “as a matter of policy BNSF seeks to work
21 collaboratively with local jurisdictions, such as Clark County, to address local interests through
22 voluntary compliance.” (Dkt. 9 at 25.) BNSF has repeatedly offered to work with the County
23 “in the manner outlined in the *Ayers* case.” *Id.* at 26.¹ Although BNSF misapplies the holding in
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28 ¹ Attorney James Lynch also confirmed via email on September 5, 2018, that “BNSF strives to be a good neighbor,
29 and works collaboratively with local jurisdictions like Clark County where possible regardless whether it formally
applies for permits.” (Dkt. 9 at 9.)

1 *Town of Ayer*— because Clark County is implementing federal law— BNSF proposed to
2 voluntarily submit much of the same project information that would be required through the
3 permitting process. Specifically, BNSF proposed: (1) sharing development plans; (2) using local
4 best management practices when constructing the railroad facilities; (3) implementing
5 appropriate precautionary measures at the railroad facility; (4) providing representatives to meet
6 periodically with the County to seek mutually acceptable ways to address local concerns; and (5)
7 submitting environmental monitoring or testing information for an appropriate period of time
8 after operations begin. *Id.* Now, just weeks after making this proposal, BNSF cannot credibly
9 claim that providing the same type of information in a permitting process would constitute
10 irreparable harm.
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13 Moreover, given that BNSF has charged full steam ahead with their construction project,
14 much of the groundwork and expense which would otherwise be associated with the National
15 Scenic Area Permit process has presumably already been expended. (Decl. of Lewis, ¶ 2, Ex. A,
16 Photographs of BNSF Construction.) The bottom line here is that BNSF has only recently made
17 a unilateral decision that it does not want to comply with the long standing National Scenic Area
18 Permit process; a process which they have followed in years past and one which they explicitly
19 assured the Department of Ecology that they would participate in this time as well.
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22 Finally, BNSF's recent concern that complying with the permit process may cause
23 "delays in the Construction Project" (Dkt. 8 at 30) is particularly unpersuasive given the timeline
24 of events in this matter. BNSF submitted its SEPA checklist in January, 2016, wherein it not
25 only confirmed that applying for the National Scenic Area Permit it now seeks to avoid was
26 necessary, but also assured that it would do so. The Department of Ecology relied upon
27 these representations. (Decl. of McGowen, ¶ 5.) Clark County did not learn that BNSF had
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1 begun construction on the project until receiving a complaint from a concerned local
2 resident on August 20, 2018. (Decl. of Davia, ¶ 3.) BNSF did not advise Clark County of
3 the position it now takes until September 5, 2018, a full 2.5 years after affirmatively
4 assuring the Department of Ecology that they would do so. As this timeline clearly
5 demonstrates, to the extent following through with its promise to apply for a National
6 Scenic Area Permit may arguably result in delay, BNSF has only itself to blame. This is yet
7 another factor that cuts against BNSF's assertion of irreparable harm. *See, e.g., Oakland*
8 *Trib., Inc., v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

11 **4. BNSF Has Failed to Show the Balance of Equities Tips in its Favor.**

12 In assessing whether the Plaintiff has demonstrated that the balance of equities tip in
13 its favor, the court must balance the interests of all parties and weigh the damage to each.
14 *Stormans, Inc., v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (*quotations and citations*
15 *omitted*). In other words, a court "must balance the harm that will occur to the moving party
16 from the denial of the preliminary injunction with the harm that the non-moving party will
17 incur if the injunction is granted." *Id.*

18 The balance of the equities weighs against the entry of a preliminary injunction here.
19 As outlined above, a preliminary injunction is *not* a preliminary adjudication on the merits
20 but, rather, a device for preserving the status quo. *Sierra On-Line, Inc., v. Phoenix*
21 *Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). The status quo refers not simply to *any*
22 situation before the filing of a lawsuit but, instead, to "the last uncontested status which preceded
23 the pending controversy." *GoTo.com, Inc., v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir.
24 2000) (*quoting, Tanner Motor Livery, Ltd, v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963).

25 Here, BNSF acknowledged to other regulatory agencies, nearly three years before
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1 taking its current position, that it would be applying for a National Scenic Area Permit, as
2 administered by and through Clark County. Instead of following through with this assurance, it
3 began construction on this project without even providing notice to the County. Now BNSF
4 comes to this Court with unclean hands asking to preserve a "status quo" of their creation,
5 which is favorable only to them. BNSF should not be allowed to continue construction of a
6 project, without providing any information as to its impact, simply because it was able to begin
7 construction before anyone was aware that they were not going to follow through with their
8 prior assurances—assurances which were also consistent with their prior course of conduct (*i.e.*,
9 obtaining National Scenic Area Permits). The status quo applicable to this case is not the
10 unpermitted construction that BNSF insolently began but, rather, the pre-construction condition
11 that existed when BNSF submitted its SEPA checklist to the Department of Ecology in January,
12 2016.

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15 **5. An Injunction is Not in the Public Interest.**

16 The public interest inquiry "primarily addresses the impact of the preliminary
17 injunction on non-parties rather than parties." *Sammartano v. First Judicial District Court*,
18 303 F.3d 959, 974 (9th Cir. 2002). As to the public interest, "courts of equity should pay
19 particular regard for the public consequences in employing the extraordinary remedy of
20 injunction." *Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989 (9th Cir. Mont. 2011).
21 Significantly, courts have held "there is inherent harm to an agency in preventing it from
22 enforcing regulations that Congress found it in the public interest to direct that agency to
23 develop and enforce." *Seaside Civic League, Inc., v. United States HUD*, 2014 U.S. Dist.
24 LEXIS 147733, *1 (N.D. Cal. Oct. 15, 2014); *see also, Cornish v. Dudas*, 540 F. Supp. 2d 61,
25 65 (D.D.C. 2008), *aff'd sub nom., Cornish v. Doll*, 330 F. App'x 919 (Fed. Cir. 2009); (same)
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1 *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S. Ct. 359,
2 54 L.Ed.2d 439 (1977) (holding analogously that "any time a State is enjoined by a
3 court from effectuating statutes enacted by representatives of its people, it suffers a form of
4 irreparable injury"). Here, the issuance of the injunction would enjoin two governments
5 from enforcing the federal regulations that they are mandated to enforce.²
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7 Through their implementation of the National Scenic Area Act, Defendants advance
8 the public interest to "protect and provide for the enhancement of the scenic, cultural,
9 recreational, and natural resources of the Columbia River Gorge, and to protect and support
10 the economy of the Columbia River Gorge." This is to be done "in a manner that enhances
11 the scenic, cultural, recreational, and natural resources of the Gorge . . . consistent with and
12 implementing the Management Plan for the Columbia River Gorge National Scenic Area."
13 Clark County, Washington, Unified Development Code, Title 40.
14

15 Here, BNSF complains that they face the possibility of losing customers and incurring
16 added expenses by complying with the permitting process, as they have previously promised to
17 do. (Dkt. 8 at 29-31.) Put simply, BNSF asks this Court to put its own financial gain ahead of
18 the broader public interests that Congress recognized in the National Scenic Area Act and which
19 are advanced by Defendants in this matter. As such, it is in the public interest to deny BNSF's
20 preliminary injunction.
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23 **B. The Doctrine of Primary Jurisdiction Precludes Injunctive Relief.**

24 The doctrine of primary jurisdiction is precisely applicable to this lawsuit. The Ninth
25 Circuit has explained how the doctrine of primary jurisdiction operates:
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28 ² 16 U.S.C. § 544c(b) requires the Gorge Commission to use procedures consistent with Oregon and Washington
29 administrative law and conflicts of interest law, which includes prohibitions against conflicts of interest, prejudging
adjudications, and contested cases.

1 “When there is a basis for judicial action, independent of agency proceedings,
2 courts may route the threshold decision as to certain issues to the agency
3 charged with primary responsibility for governmental supervision or control of
4 the particular industry or activity involved.” The doctrine applies when
5 “protection of the integrity of a regulatory scheme dictates preliminary resort to
6 the agency which administers the scheme.” Thus, it is the extent to which
Congress, in enacting a regulatory scheme, intends an administrative body to
have the first word on issues arising in judicial proceedings that determines the
scope of the primary jurisdiction doctrine.

7 *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987) (citations
8 omitted).

9 The Ninth Circuit continued:

10 There are four factors uniformly present in cases where the doctrine properly is
11 invoked: (1) the need to resolve an issue, that (2) has been placed by Congress
12 within the jurisdiction of an administrative body having regulatory authority (3)
13 pursuant to a statute that subjects an industry or activity to a comprehensive
regulatory scheme that (4) requires expertise or uniformity in administration.

14 *Id.*

15 This matter readily satisfies each of those elements: (1) BNSF seeks to resolve the
16 application of the National Scenic Area authorities to its construction proposal; (2) Clark
17 County is directly implementing the National Scenic Area Act, which specifically empowers
18 the Gorge Commission to hear and decide appeals from National Scenic Area permit
19 decisions, 16 U.S.C. § 544m(a)(2); (3) the National Scenic Area Act requires administration
20 of the National Scenic Area, pursuant to a comprehensive management plan that the Gorge
21 Commission adopts, the U.S. Secretary of Agriculture concurs with, and must meet
22 congressional-imposed standards, and that counties implement through ordinances that the
23 Commission and U.S. Secretary of Agriculture must review and approve, 16 U.S.C. §§ 544d-
24 544f; and (4) the Columbia River Gorge Commission is a bi-state agency created by Oregon
25 and Washington, through an interstate compact, and ratified by Congress for the purpose,
26 *inter alia*, of creating a single Management Plan for the bi-state region, 16 U.S.C. § 544d.
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1 According to the Ninth Circuit, "an issue either is within an agency's primary
2 jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial
3 determination." *U.S. v. General Dynamics Corp.*, 828 F.2d at 1364, n. 15. "Failure to defer
4 when the doctrine so mandates is reversible error." *Id.* Resolving questions of whether and
5 how particular National Scenic Area standards apply to BNSF's current construction project
6 are within the Gorge Commission's sole jurisdiction.³

8 Further, once this Court concludes that this matter is within the Gorge Commission's
9 primary jurisdiction, this Court will be bound by determinations made in the collateral
10 administrative proceedings and may not, itself, review the merits of the agency's decision.
11 *See, Id.* at 1360. This is because the Columbia River Gorge National Scenic Area Act
12 commits exclusive jurisdiction to review decisions of the Columbia River Gorge Commission
13 respectively to the State courts of Washington and Oregon. 16 U.S.C. §§ 544m(b)(4)-(6);
14 *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616,620-21 (9th Cir.
15 1992). Correspondingly, federal district courts lack subject matter jurisdiction to do so. *Id.* at
16 621. Where primary jurisdiction exists in an administrative agency, normally, "the case
17 should be dismissed without prejudice so that the parties may pursue their administrative
18 remedies." *Syntek Semiconductor Co., Ltd., v. Microchip Technology, Inc.*, 307 F.3d 775, 782
19 (9th Cir. 2002).

23 CONCLUSION

24 BNSF has failed to meet the heavy burden necessary to obtain a preliminary injunction
25 that seeks to alter the status quo. BNSF cannot demonstrate a high likelihood of success because
26

27 ³ While the STB may have experience applying and administering ICCTA generally, it does not have expertise in
28 cases like this that involve the question of whether a railroad must complete a federally-mandated administrative
29 appeal process, nor does the STB have expertise, much less a role, in administering the National Scenic Area Act.

1 ICCTA preemption, its sole legal theory, is inapplicable to federal environmental regulatory
2 schemes like the one established by The National Scenic Area Act. Moreover, BNSF has not
3 demonstrated that it will suffer irreparable harm by engaging in a permitting process that it has
4 followed for more than twenty years and has committed to following in this case. Lastly, the
5 equities and public interest weigh heavily against a preliminary injunction that would permit
6 BNSF to continue to alter the landscape and the status quo in the Columbia River Gorge without
7 obtaining a National Scenic Area Permit.
8

9 Dated this 5th day of December, 2018.
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11

12 s/ Taylor Hallvik

13 Taylor Hallvik, WSBA #44963

14 Deputy Prosecuting Attorney

15 Clark County Prosecutor's Office – Civil Division

16 PO Box 5000

17 Vancouver WA 98666-5000

18 Tele: (360) 397-2478

19 Fax: (360) 397-2184

20 Email: taylor.hallvik@clark.wa.gov
21
22

23 *Attorney for Defendants*
24
25
26
27
28
29

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2018, I electronically filed the following:

1. Clark County Defendants' Response to Motion for Preliminary Injunction;
2. Declaration of Richard Daviau, with attached exhibits;
3. Declaration of Alicia Lewis, with attached exhibits; and
4. Declaration of Vincent McGowan, with attached exhibits;

with the Clerk of the Court using the CM/ECF system, which will send notification to the following:

Attorneys for Plaintiff:

James M. Lynch
J. Timothy Hobbs
K & L Gates, LLP
925 Fourth Avenue #2900
Seattle WA 98104-1158
Email to: jim.lynch@klgates.com; ethan.norss@klgates.com;
tim.hobbs@klgates.com; laura.white@klgates.com

Barry M. Hartman
K & L Gates, LLP
1601 K St NW
Washington DC 20006-1600
Email to: barry.hartman@klgates.com; klgateseservice@klgates.com

Benjamin J. Horwich
Allison M. Day
Andre W. Brewster, III
Munger Tolles & Olson
560 Mission St, 27th Floor
San Francisco CA 94105-2907
Email to: ben.horwich@mto.com; susan.ahmadi@mto.com
allison.day@mto.com; mark.roberts@mto.com
andy.brewster@mto.com; sarah.williams@mto.com

/////

1 Ginger D. Anders
2 Munger Tolles & Olson
3 1155 F Street NW, Seventh Floor
4 Washington DC 20004
5 Email to: ginger.anders@mto.com; felicia.bankhead@mto.com

6 Attorneys for *Intervenor, Friends of the Columbia Gorge, Inc.*:

7 Nathan Baker
8 Steven D. McCoy
9 Friends of the Columbia Gorge, Inc.
10 333 SW Fifth Avenue #300
11 Portland OR 97204
12 Email to: nathan@gorgefriends.org;
13 steve@gorgefriends.org

14 Gary K. Kahn
15 Reeves Kahn Hennessy & Elkins
16 PO Box 86100
17 Portland OR 97286
18 Email to: gkahn@rke-law.com

19 Attorney for *Intervenor, Columbia River Gorge Commission*:

20 Jeffrey B. Litwak
21 Columbia River Gorge Commission
22 57 NE Wauna Avenue
23 PO Box 730
24 White Salmon WA 98672
25 Email to: jeff.litwak@gorgecommission.org

26 DATED this 5th day of December, 2018.

27 s/ Thelma Kremer

28 Thelma Kremer, Legal Secretary